Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-2025
No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONDALEE H. KING,
Petitioner,
vs.
STATE OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

RICHARD J. ROME
(Counsel of Record)
Attorney at Law
421 West First, Suite C
Post Office Box 964
Hutchinson, Kansas 67501-0964
(316) 662-2383
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

In denying the Petition for Review of the decision of the Kansas Court of Appeals wherein the trial Court's ruling to suppress evidence was reversed because of Petitioner's lack of standing, following *Wong Sun v. United States*, 371 U.S. 471, was the Petitioner's right to be free from illegal searches and seizures under the fourth amendment to the U.S. Constitution violated by the Kansas Supreme Court?

TABLE OF CONTENTS

Question Presented for Review I
Table of Authorities III
Opinions Below 1
Jurisdiction 2
Constitutional Provision Involved 2
Statement of the Case 3
Reason Why the Writ Should Be Granted 5
Conclusion 9

Appendix—

Appendix "A"—

Order of the Kansas Supreme Court Denying Review, Reported at 24 Kan. Advance Sheets No. A1

Appendix "B"—

Unpublished Opinion of the Kansas Court of Appeals, Reported at ..... Kan. App. 2d Advance Sheets No. A2

Appendix "C"—

Companion Opinion of the Kansas Court of Appeals, *State of Kansas v. Jean A. Beeney*, Case No. 62,634 ..... A8

Appendix "D"—

Opinion of Trial Court A18

TABLE OF AUTHORITIES

Cases

Armstrong v. City of Salina, 211 Kan. 333, Syl. 2, 507 P.2d 323 (1973) 6
Chute v. Old American Ins. Co., 6 Kan. App. 2d 412 6
Eckdall v. Negley, 5 Kan. App. 2d 724, Syl. 1, 624 P.2d 474 (1981) 6
Farmers Ins. Exchange v. Schropp, 222 Kan. 612 6
Hesston Corp. v. Kansas Employment Security Board of Review, 235 Kan. 716 6
In re Zappa, 6 Kan. App. 2d 633 6
Jackson v. City of Kansas City, 235 Kan. 278, 680 P.2d 877 (1984) 6
State ex rel. Ludwick v. Bryant, 237 Kan. 47 6
State of Kansas v. Jean A. Beeney, Case No. 62,634 .... 1, 8
State v. Bright, 229 Kan. 185 6
State v. Brown, 6 Kan. App. 2d 556 6
State v. Pettay, 216 Kan. 555 6
Wong Sun v. U.S., 371 U.S. 471 ..... 1, 5, 8, 9

Constitutional Provision

Fourth Amendment to the U.S. Constitution 1, 2

Statutes

K.S.A. 22-3601(a) 3
K.S.A. 22-3603 3
K.S.A. 65-4127 3
K.S.A. 65-4127b(a)(3) 3

No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONDALEE H. KING,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

OPINIONS BELOW

The order of the Kansas Supreme Court denying review is reported at 24 Kan. Advance Sheets, No. ....., and attached hereto as Appendix "A". The unpublished opinion of the Kansas Court of Appeals is reported at ..... Kan. App. 2d Advance Sheets, No. ....., and attached hereto as Appendix "B". A companion opinion of the Kansas Court of Appeals, *State of Kansas v. Jean A. Beeney,* Case No. 62,634, is attached hereto as Appendix "C". The opinion of the trial Court, below is attached hereto as Appendix "D".

JURISDICTION

The opinion of the Kansas Court of Appeals was filed January 6, 1989. The order of the Kansas Supreme Court denying review was filed March 14, 1989.

This Court's jurisdiction is involved under Supreme Court Rule 17.1(c). The instant petition for a writ of certiorari is filed within the period of extension granted by Associate Justice Byron R. White on May 9, 1989.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On April 16, 1987, the State of Kansas, through its local prosecutor, filed a criminal complaint in the Reno County, Kansas, District Court, charging the Petitioner with two offenses contrary to the statutes of Kansas, to-wit: a violation of K.S.A. 65-4127, felony possession of narcotic drugs with intent to sell, and a violation of K.S.A. 65-4127b(a)(3), misdemeanor possession of marijuana.

A preliminary hearing was held in the above-referred to matter on September 14, 1987. The Petitioner was bound over for trial on said date, and an Information was filed against her on September 24, 1987. A plea of not guilty was entered by the Petitioner on or about October 5, 1987.

A motion to suppress evidence was filed on November 12, 1987, by the Petitioner, and heard on March 16, 1988. That motion was sustained by the trial Court, and a Memorandum Opinion was filed by said Court on March 17, 1988. (See: Appendix "D"). The State of Kansas filed a Notice of Appeal to the Kansas Court of Appeals pursuant to K.S.A. 22-3601(a) and K.S.A. 22-3603 (pertaining to interlocutory appeals), on or about March 22, 1988.

Judge Brown's Memorandum Opinion of March 17, 1988, found the following to be the facts in this case. Petitioner has no quarrel therewith, and sets them out:

"At 1:47 A.M. on April 15, 1987, Officer Randy Hendricks of the Reno County Sheriff's Office noticed that a vehicle approaching him had only one headlight lit. He stopped the vehicle, a pickup truck being driven by Gene Beeney, and saw that neither taillight was operating and that the tag on the pickup had expired. While talking to Beeney, Hendricks looked in the pickup and saw a radar detector, two-way radio, a spotlight, an amber

light with the connecting wires still attached and a blue vinyl carrying case. Hendricks took Beeney to his patrol car and wrote him two traffic citations for the expired tag and no proof of liability insurance. Hendricks then asked Beeney if he could check the two-way radio and amber light for serial numbers to see if they had been reported stolen, and Beeney consented. Hendricks went to the pickup, looked at the spotlight and radar detector. After that, he unzipped the blue vinyl case, and discovered what appeared to be drugs and paraphernalia inside. Hendricks returned to his patrol car, tore up the two traffic citations and placed Beeney under arrest for the charges for which he was originally issued citations. Beeney was transported to the Reno County Detention Center. While being booked, two bags of what appeared to be methamphetamine were found on his person. Beeney then stated that he had been given a pound of methamphetamine to sell in the Hutchinson area and was staying in a local hotel room. This information was placed in an affidavit and a search warrant was obtained for the pickup and motel room. The defendant in this case, Rondalee King, was found in the motel room, and now stands charged with intent to sell and possession of marijuana. She asks that all the evidence be suppressed."

After Judge Brown suppressed the evidence seized from Beeney at the scene of the traffic stop and from the motel room in which Petitioner was staying as "fruit of the poisonous tree", the State, as referred-to above, appealed to the Kansas Court of Appeals. Beeney also appealed to that Court. The Kansas Court of Appeals reversed the trial Court's decision to suppress the evidence as to this Petitioner. They affirmed as to Beeney. Petitioner filed a Petition For Review of the Court of Appeals' decision against her. That Petition was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

In Depriving the Petitioner for Review of the Decision of the Kansas Court of Appeals, Wherein the Trial Court's Ruling to Suppress Evidence Was Reversed Because of Petitioner's Lack of Standing, Purporting to Follow Wong Sun v. United States, 371 U.S. 471, the Petitioner's Right to Be Free From Illegal Searches and Seizures Under the Fourth Amendment to the U.S. Constitution Was Violated.

The decision of the Kansas Court of Appeals, filed on January 6, 1989, as well as the decision of the Kansas Supreme Court failing to review it, should be reversed and the ruling of the trial Court reinstated.

On page 3 of the Appeals Court opinion, paragraph 3, the Court states in part:

> ". . . While our review of this case is made difficult by the failure of the *State to include* the Motion to Suppress, the affidavit supporting the State's application for the warrants, and the two warrants which were issued, we conclude the defendant, Rondalee King, lacks standing to request suppression of of the evidence found in the vinyl case as well as the fruits of that search." [Emphasis supplied]

In other words, the honorable Court of Appeals sustained the appeal of the State on an absent and incomplete record. They simply picked the chestnuts out of the fire for the State in this case, and all to the detriment of the Appellee.

There are numerous cases which have been decided by the Court of Appeals and the Supreme Court of Kansas in which the burden is clearly placed upon the Ap-

pellant to designate a record sufficient to present issues on appeal, and to establish claimed error. See: *State v. Brown*, 6 Kan. App. 2d 556, 558, citing *Farmers Ins. Exchange v. Schropp*, 222 Kan. 612. See Also: *In re Zappa*, 6 Kan. App. 2d 633, and *Chute v. Old American Ins. Co.*, 6 Kan. App. 2d 412.

The Supreme Court of Kansas held in *State v. Bright*, 229 Kan. 185, at pages 190 and 191, that:

> "In the absence of such a record, we presume that the action of the trial court was proper. *State v. Pettay*, 216 Kan. 555, 557 . . ."

It also stated in *Hesston Corp. v. Kansas Employment Security Board of Review*, 235 Kan. 716 at p. 724:

> "It is the duty of an appellant to bring up a complete record of all matters upon which review is sought. *Armstrong v. City of Salina*, 211 Kan. 333, Syl. 2, 507 P.2d 323 (1973); *Eckdall v. Negley*, 5 Kan. App. 2d 724, Syl. 1, 624 P.2d 474 (1981). Stated another way, the appellant has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, we presume that the action of the trial court was proper. *Jackson v. City of Kansas City*, 235 Kan. 278, 307, 680 P.2d 877 (1984);" *State v. Bright*, supra.

See Also: *State ex rel. Ludwick v. Bryant*, 237 Kan. 47.

In the case as bar, the record, meager though it is, does support the finding of Judge Brown. The latter stated, in his *Memorandum Opinion*, filed March 17, 1988:

> "The search of the blue vinyl case, however, led to the arrest of the defendant, the discovery of

> the drugs on his person, and his statement to the police detective. *The affidavit submitted to the magistrate for the issuance of the search warrant did not mention specifically the search of the vinyl case, but was drawn in such a way as to indicate that all drugs and paraphernalia were found after the arrest.* Clearly all the evidence extracted from Beeney and the later authorized searches of the pickup and motel room were the product of the improper search of the vinyl case and must be suppressed." [Emphasis supplied]

Although the State (Appellant) failed to designate a proper record upon which its arguments were based, the above-quoted portion of Judge Brown's opinion was a part of the Appellee's brief in her Argument And Authorities, page 5. The Court of Appeals in its opinion of January 6, 1989, quotes from Judge Brown's opinion on pages 4 and 5, which is set out in this paragraph, disagreeing with his conclusion, but failing to note that the affidavit submitted by the police for the search warrant of Appellee's room "*was drawn in such a way as to indicate that all drugs and paraphernalia were found after the arrest.*" [Emphasis supplied]

In other words, Judge Brown was bothered by the fact that, in his opinion, the seizure of the evidence from the vinyl case was tainted and the fruit of the poisonous tree. Also, he stated directly that the police used this evidence to improperly obtain two search warrants, one of which was for the room occupied by the Appellee and her 8-year-old daughter. He then suppressed all evidence seized from the vinyl case and that seized as a result of the improperly-obtained search warrants.

This Appellee had a right to be free from an improper invasion of her room on the night in question. She had an expectation of privacy. The police used information and evidence illegally obtained from Beeney to be in a position to search her room. They failed to properly and completely advise the magistrate in obtaining the search warrant for her room. Then they fail, through the State's attorney, to provide the Kansas Court of Appeals with a proper record of what they actually did on April 15, 1987. Judge Brown had the entire record before him at the suppression hearing, including the affidavit for search warrant. He based his decision to suppress on the basis of fairness. The State should not be rewarded for its failure to provide all of the record to the Court of Appeals. Clearly the decision of the Court of Appeals should be reversed. A review of *Wong Sun v. U.S.*, 371 U.S. 471, in light of the facts of this case is fully warranted.

Did not the Court of Appeals, and the Kansas Supreme Court, erroneously find that the Petitioner herein had no standing? She was an occupier of Room 102 of the Executive Inn at the time and date of this incident, along with her eight-year-old daughter. As an occupant of Room 102 she had a reasonable expectation of privacy in those premises. That expectation of privacy would certainly include the key to the room. Here, the police improperly seized the evidence from Beeney (See: *State of Kansas v. Beeney*, Kansas Court of Appeals, Case No. 62,634, attached hereto as "Appendix C"). That evidence included the key to Petitioner's room. False information was given by the officers before the magistrate to obtain a search warrant to that room. But for the illegal seizure from Beeney and the false swearing to the magistrate no evidence of probable cause existed as to this

Petitioner. The State of Kansas is asking that these improprieties be rewarded by allowing the possible conviction of this Petitioner. Certainly this Court did not intend for *Wong Sun,* supra, to carry the type of interpretation given it herein by the Kansas Court of Appeals and the Kansas Supreme Court. She asks that her Petition for Certiorari be granted to prevent manifest injustice. If the decisions of the two Kansas Courts are allowed to stand, Beeney, the person who possessed all of the money (some $39,000.00), the paraphernalia, and the illegal drugs will be allowed (and has been) to go free, while the Petitioner, who was simply sleeping in her motel room with her eight-year-old daughter, will face a trial featuring the entire array of Beeney's evidence against her. This is not, and cannot be called, fairness.

CONCLUSION

For the reasons and arguments stated herein, the Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Kansas, to review that Court's decision which, in effect, affirmed the decision of the Kansas Court of Appeals, and reversed the trial Court's decision suppressing the illegally seized evidence against the Petitioner, thereby denying the constitutional rights of said Petitioner.

Respectfully submitted,

RICHARD J. ROME
(Counsel of Record)
Attorney at Law
421 West First, Suite C
Post Office Box 964
Hutchinson, Kansas 67501-0964
(316) 662-2383
Attorney for Petitioner

APPENDIX

APPENDIX "A"

(Filed March 14, 1989)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 88-62105-A

State of Kansas,
Appellant,

v.

Rondalee H. King,
Appellee.

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date March 14, 1989

APPENDIX "B"

(Filed January 6, 1989)

NOT DESIGNATED FOR PUBLICATION

No. 62,105

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

RONDALEE H. KING,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; PORTER K. BROWN, judge. Opinion filed January 6, 1989. Appeal sustained.

Timothy J. Chambers, county attorney, and *Robert T. Stephan*, attorney general, for the appellant.

Richard J. Rome, of Hutchinson, for the appellee.

Before ABBOTT, C.J., BRISCOE, J., and R. DAVID LAMAR, District Judge, assigned.

PER CURIAM: Pursuant to K.S.A. 22-3603, the State appeals from the district court's order suppressing evidence found to be the fruits of an illegal search.

Officer Hendricks of the Reno County Sheriff's Office stopped a pickup driven by Jean Alvin Beeney after ob-

serving the pickup had no operating taillights and only one operating headlight. While talking to Beeney, Hendricks noticed a roach clip with a small, metal, western type hat attached to it on Beeney's belt. While Beeney was getting his license, Hendricks shined his flashlight into the interior of the pickup and observed a radar detector, a two-way radio, a blue vinyl carrying case, a large spotlight, and a large amber light. Beeney told Hendricks the blue vinyl carying case belonged to his wife and contained "just wife things." Hendricks then asked Beeney for his vehicle registration and an insurance card. Beeney produced only the former.

Hendricks asked Beeney to come back to the patrol car, where Hendricks called the sheriff's dispatcher and requested another officer for backup. Hendricks then wrote out two tickets, one for no proof of liability insurance and one for an expired license tag. Hendricks then asked Beeney for permission to check the amber light for serial and model numbers. Beeney consented and Hendricks checked the light. Hendricks then asked Beeney if he could check the two-way radio and Beeney consented. Hendricks asked Officer Chambers, who had just arrived, to check for serial and model numbers on the radio and the light. Hendricks then walked back to the pickup and checked the radar detector and spotlight for serial and model numbers, and opened the blue vinyl case to examine its contents. Hendricks testified he did not have permission to open the case. The case contained two bundles of cash, small baggies containing a white chalky substance, and several items of drug paraphernalia. Beeney was then arrested.

After Beeney's arrest, a body search and a further search of the pickup were conducted. As a result, a motel

key for room 102 of the Executive Inn Motel and a cigarette case containing some marijuana were discovered. Beeney was taken to the law enforcement center where a further search of his person revealed a plastic baggie containing a clear chalky substance and another plastic bag containing a white powdery substance. Warrants were obtained to search room 102 of the Executive Inn and to further search the pickup. The police found the room was registered to Jean Beeney and were told that a woman and a young girl were in the room. The woman was the defendant, Rondalee King, who was the wife of Beeney. In executing the warrant, the officers found a small "square glassy type item" which contained a powdery substance. King was arrested and taken to the detention center.

King was charged with two counts of possession of methamphetamine with intent to sell (K.S.A. 1987 Supp. 65-4127b[b][2]) and one count of possession of marijuana (K.S.A. 1987 Supp. 65-4127b[a][3]). Upon King's motion, the district court conducted a suppression hearing. The court ruled the search of the vinyl case was improper and that the evidence found in the later search of the pickup and the motel room were fruits of the illegal search of the vinyl case and must be suppressed.

The sole issue raised by the State is whether the district court erred in finding the search of the vinyl case was illegal. The State seeks to justify the warrantless search of the vinyl case under three theories: an automobile search exception, a search incident to an arrest, or the inevitable discovery doctrine.

Before we can address this issue, we must first satisfy ourselves that this defendant, Rondalee King, has standing to seek suppression of the evidence found in the vinyl

case. While our review of this case is made difficult by the failure of the State to include the motion to suppress, the affidavit supporting the State's application for the warrants, and the two warrants which were issued, we conclude the defendant, Rondalee King, lacks standing to request suppression of the evidence found in the vinyl case as well as the fruits of that search.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The amendment protects people, not places, and is aimed at the preservation of the individual's reasonable expectation of privacy. *Katz v. United States,* 389 U.S. 347, 351-53, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). An illegal search can only violate the rights of those who have a legitimate expectation of privacy in the invaded place. Even if a person is present when the search is conducted, the basic test to determine whether that person has standing to challenge the validity of the search is not whether that person had a possessory interest in the items seized but whether he or she had an expectation of privacy in the area searched. *State v. Epperson,* 237 Kan. 707, 716, 703 P.2d 761 (1985); *State v. Worrell,* 233 Kan. 968, 969-70, 666 P.2d 703 (1983). This expectation of privacy can arise not only in the search of premises but also in the search of automobiles. *United States v. Hensley,* 469 U.S. 221, 83 L. Ed. 2d 604, 105 S. Ct. 675 (1985).

The proponent of a motion to suppress has the burden of establishing that his or her own Fourth Amendment rights were violated by the challenged search and seizure. *State v. Epperson,* 237 Kan. at 717. Standing to invoke the exclusionary rule has been confined to situations where the government seeks to use evidence to incrim-

inate the *victim* of the unlawful search. *Divine v. Groshong,* 235 Kan. 127, 134, 679 P.2d 700 (1984).

Here, King was not present when the truck driven by Beeney was stopped. She was at the motel room. King also admits in her appellate brief, and apparently admitted to the trial court, that she neither owned the truck nor claimed an interest in the property seized.

The trial court acknowledged these facts and concluded that King had no standing to object to the search of the pickup since she neither owned nor was in possession of the vehicle, and claimed no interest in the property seized. We agree with this conclusion. The trial court then, however, granted King's motion to suppress all evidence obtained during and after the search of the vinyl case. Specifically, the court ruled: "Clearly all the evidence extracted from Beeney and the later authorized searches of the pickup and motel room were the product of the improper search of the vinyl case and must be suppressed." With this conclusion, we disagree. Under the holding of *Wong Sun v. United States,* 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), if King had no standing to object to the search of the vinyl case, she had no standing to object to the admissibility of evidence which was the fruit of that search. The defendant's Fourth Amendment rights are violated only when the challenged conduct here, the search of the vinyl case invades her legitimate expectation of privacy rather than that of a third party. *United States v. Payner,* 447 U.S. 727, 731, 65 L. Ed. 2d 468, 100 S. Ct. 2439 (1980).

In *Wong Sun,* federal narcotics agents illegally arrested Toy, who gave information leading the agents to Yee. At Yee's house, heroin was discovered. Yee told the agents that he obtained the heroin from Toy and a per-

son later identified as Wong Sun. The United State Supreme Court held the narcotics were inadmissible against Toy but were admissible against Wong Sun. The Court stated:

> "Our holding, supra, that this ounce of heroin was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." 371 U.S. at 491-92.

In other words, Toy had standing and Wong Sun did not. Applying this principle to this case, the court should not have suppressed the evidence as against King.

Appeal sustained.

APPENDIX "C"

(Filed April 28, 1989)

NOT DESIGNATED FOR PUBLICATION

No. 62,634

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

JEAN A. BEENEY,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; PORTER K. BROWN, judge. Opinion filed April 28, 1989. Affirmed.

Timothy J. Chambers, county attorney, and *Robert T. Stephan*, attorney general, for the appellant.

Jack Focht, of Focht, Hughey, Hund & Calvert, of Wichita, for the appellee.

Before LARSON, P.J., STEVEN P. FLOOD, District Judge, assigned, and DAVID S. KNUDSON, District Judge, assigned.

LARSON, J.: The State of Kansas brings an interlocutory appeal challenging the district court's order suppressing evidence in favor of Jean A. Beeney. K.S.A. 22-3601(a) and K.S.A. 22-3603.

The facts are known to the parties and will be restated only as necessary for this opinion.

Beeney first alleges we are without jurisdiction to hear this appeal because the journal entry shows on its face that the order appealed from was entered April 14, 1988, and the notice of appeal was filed July 22, 1988, much longer than the ten days' appeal time allowed under K.S.A. 22-3603.

An evidentiary hearing on a motion to suppress had been held in a companion case, *State v. King,* and the parties herein agreed to be bound by the court's ruling therein. On March 17, 1988, the court made its ruling in the *King* case granting the defendant's motion to quash and suppressing the evidence. *State v. King* (unpublished opinion No. 62,105, filed January 6, 1989.)

On April 14, 1988, Beeney's counsel prepared a proposed memorandum opinion and journal entry, which was mailed to the Reno County Attorney for his approval, to obtain the court's signature, and for filing.

The record is silent as to the date the journal entry was signed by the court, which may have occurred any time between April 15, 1988, and July 14, 1988, the date it was filed.

State v. Moses, 227 Kan. 400, Syl. ¶ 2, 607 P.2d 477 (1980), stated that the judgment in a criminal case, whether it imposes confinement, imposes a fine, grants probation, suspends the imposition of sentence, or imposes any combination of those alternatives, is effective upon pronouncement from the bench. Our Supreme Court in *Moses* specifically held that K.S.A. 60-258, relating to the entry of judgment in civil cases, does not apply in criminal cases. The court justified the deci-

sion that an appeal was not timely filed in holding that, because the defendant was personally present when he had been sentenced, the filing of a journal entry is but a record of what has already been done.

Such is not the case here, and we do not deem that the clearly stated rule of *Moses* requires dismissal. The parties by their mutual consent and agreement, in the interest of judicial efficiency and without requiring multiple hearings of the same contentions in different cases, did not have any order or ruling announced or in effect until its filing of record in the office of the clerk of the district court.

Our finding of jurisdiction does not aid the appellant, as the ruling of the district court must be affirmed.

We first note that our ruling in *State v. King*, which involved similar facts but a different defendant, may be considered by our court under Rule 7.04 (1988 Kan. Ct. R. Annot. 33), "to support a claim of res judicata, collateral estoppel, or law of the case."

Here, the trial court held the evidence must be suppressed for the following reasons: (1) Beeney was not under arrest when Hendricks conducted the search; (2) Beeney did not consent; (3) Beeney was not close to the truck; and (4) nothing about the exterior of the vinyl case was incriminating in nature. Consequently, the trial court held that all evidence extracted from Beeney and the later authorized searches of the truck and the motel room were the products of the improper search of the vinyl case and must be suppressed. See *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

The trial court relied in part on *State v. Galloway,* 232 Kan. 87, 652 P.2d 673 (1982), which held that the plain view exception applies only when the following requirements are met: (1) the initial intrusion is lawful by virtue of a search or arrest warrant, waiver, or exigent circumstances; (2) the discovery of the evidence is inadvertent; and (3) the authorities immediately have reasonable or probable cause to believe the evidence observed in plain view is incriminating in nature. 232 Kan. at 93-94. In addition, the trial court relied on *State v. Epperson,* 237 Kan. 707, 711, 703 P.2d 761 (1985), which holds that under a search incident to a lawful arrest exception a lawful arrest based on probable cause or a warrant must come *before* the search.

It is well established that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). The State argues on appeal, as it did below, that the evidence is admissible under the automobile exception, the search incident to a lawful arrest exception, and the inevitable discovery doctrine. The trial court did not address either the automobile exception or the inevitable discovery doctrine in its memorandum opinion, but appears to rely exclusively on the inapplicability of the plain view exception as set forth in *Galloway.*

"If a trial court's findings on a motion to suppress evidence are supported by substantial evidence they will not be disturbed on appeal." *State v. Strecker,* 230 Kan. 602, 608, 641 P.2d 379 (1982).

> "Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.] Stated in another way, 'substantial evidence' is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. [Citation omitted.]" *Williams v. Telecommunications Co. v. Gragg*, 242 Kan. 675, 676, 750 P.2d 398 (1988).

The State's first argument of admissibility on the basis of the automobile exception is based on the rule that:

> "[W]hen police officers have made a lawful stop of a vehicle and have probable cause to believe that contraband is in the vehicle the officers may search every area of the vehicle and its contents which might reasonably contain the contraband, without the necessity of first obtaining a warrant." *State v. Jaso*, 231 Kan. 614, 622, 648 P.2d 1 (1982) (following *United States v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 [1982]).

Furthermore, "such probable cause justifies the search of a lawfully stopped vehicle and justifies the search of every part of the vehicle and its contents that may conceal the object of the search." 231 Kan. at 622. It logically follows that the officers could have searched any container in the vehicle which they had probable cause to believe might contain contraband.

The *Jaso* court distinguished the situation where officers are seeking a specific container from a situation where the officers only have probable cause to believe that contraband is somewhere in the vehicle. If the officers

have specific knowledge that they are seeking a specific container and the container is discovered in the vehicle, there appears to be no justification for a further search of the vehicle or even of the container itself until a warrant has been obtained. 231 Kan. at 621.

The State asserts that Hendricks had probable cause to search the vinyl case based upon the totality of the circumstances, and, more specifically, because of his observation of the "roach clip" and metal hat attached to the key chain on Beeney's belt. Under K.S.A. 65-4152, possession with intent to use drug paraphernalia is a crime. K.S.A. 65-4150(c) defines drug paraphernalia to include "roach clips" and punctured metal bowls. In addition, residue of a controlled substance on the object is a factor to consider in the determination of whether an item is drug paraphernalia. K.S.A. 65-4151(e). The State contends that on this basis Hendricks had sufficient probable cause to search Beeney's truck and ultimately the vinyl case.

Once an officer lawfully discovers contraband, sufficient probable cause exists to believe that the vehicle contains other contraband. *State v. Harder*, 8 Kan. App. 2d 98, 101, 650 P.2d 724 (1982).

Although Hendricks testified that he believed the items on Beeney's belt were drug paraphernalia, he did not arrest Beeney for possession of drug paraphernalia, nor did he ever testify that he believed there was other contraband inside the truck. Instead, Hendricks issued two traffic citations for no proof of liability insurance and an expired tag. Only after Hendricks searched the vinyl case and was aware of its contents did he tear up the two traffic citations and write two tickets for Beeney's arrest. In addition, Hendricks' request for

Beeney's consent to examine the lights and two-way radio for serial and model numbers indicates Hendricks did not believe he had probable cause to search the truck for contraband.

The United States Supreme Court in *Chambers v. Maroney*, 399 U.S. 42, 49, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970) states:

> " 'The measure of legality of such a seizure is . . . that the *seizing officer* shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband.' . . . 'The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.' " (Emphasis added.)

Our facts herein indicate Hendricks' state of mind was such that he did not have probable cause to believe that Beeney's truck contained other contraband. Thus, even if the other officer may have believed that the drug paraphernalia was enough to establish probable cause to search the truck. Hendricks' failure to recognize probable cause is crucial. Consequently, the automobile exception does not apply because Hendricks lacked the necessary probable cause.

The State next contends that Hendricks' search of the vinyl case falls within the exception of the search incident to a lawful arrest. The State argues that Hendricks made an arrest before he searched the vinyl case by issuing the two traffic citations, because, according to Hendricks' testimony, he had already made the decision to arrest. Statutory authority from K.S.A. 1988 Supp. 8-2106(a), (b) contradicts this argument:

"(a) A law enforcement officer may prepare and deliver to a person a written traffic citation if the law enforcement officer stops the person for a violation of:

"(1) The uniform act regulating traffic on highways, which violation is a misdemeanor or a traffic infraction.

. . . .

"(b) The citation shall contain a notice to appear in court . . . ."

Hendricks wrote two traffic citations and Beeney signed the citations, thus indicating consent to appear in court. The law specifically states that "[t]he giving of a notice to appear is not an arrest." K.S.A. 22-2202(4).

It follows that, if an arrest did occur, it happened after the search when Hendricks tore up the two traffic citations and wrote two new tickets indicating Beeney's arrest. Furthermore, Hendricks testified on cross-examination that he actually took Beeney into custody when he "had [Beeney] spread eagle on the car." The factual record illustrates that this event occurred after the search of the vinyl case.

The order of events clearly violates the precedent set forth in *State v. Epperson*. *Epperson* involved a situation where the State was attempting to justify the search based on evidence discovered during the search. The court states:

"[A] lawful arrest must come first, followed by a search, and the arrest must be based on probable cause or a warrant to be lawful. . . . The argument that an officer may conduct any search he wishes

> and, if he finds contraband, justify the search on the basis that it was incident to the later resulting arrest, is hardly persuasive." 237 Kan. at 715.

The search was neither contemporaneous in time nor confined to the immediate vicinity of the arrest. "A reasonable search may be made incident to an arrest . . . . To meet the test of reasonableness, a search may be incident to an arrest if it is substantially contemporaneous therewith and is confined to the immediate vicinity of the arrest." *State v. Caldrone*, 205 Kan. 828, 832-33, 473 P.2d 66, (1970). Assuming that the search occurred after a lawful arrest, and that it was substantially contemporaneous with the arrest, the search of the vinyl case would still be invalid as not meeting the second reasonableness requirement of confinement to the immediate vicinity of the arrest. Because Beeney was sitting in Hendricks' patrol car, the truck and vinyl case were not "within the immediate control of the accused." 205 Kan. at 832. As the trial court stated in its memorandum opinion, Beeney was not even close to the truck.

The final argument raised by the State is that, because the inevitable discovery doctrine applies, the evidence should be admitted. The inevitable discovery doctrine's application requires the prosecution to "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984). "[T]he prosecution is not to be put in a better position than it would have been in if no illegality had transpired." 467 U.S. at 443.

The State's argument rests on the premise that Hendricks originally planned all the time to arrest Beeney

for something other than the two traffic violations. The facts in the record, however, indicate that Hendricks merely issued the two traffic citations. Hendricks did not make a definite decision to arrest Beeney until after he searched the vinyl case and found contraband. But for the illegal search of the vinyl case, it appears that Hendricks would have only given Beeney the two traffic citations.

It is apparent that Beeney did not consent to the search. Thus, the State fails to establish by a preponderance of the evidence that the contraband found in the vinyl case, truck, and motel room inevitably would have been discovered by other lawful means notwithstanding Hendricks' illegal search.

Furthermore, the State's reliance on *Nix* is misplaced, as *Nix* is distinguishable from this within case. In *Nix*, police were conducting an independent investigation to locate a murder victim's body. The court stated:

> "On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had [defendant] Williams not earlier led the police to the body and the body inevitably would have been found." 467 U.S. at 449-50.

In contrast, authorities were in no way independently investigating Beeney. Lack of an independent investigation further supports the conclusion that the inevitable discovery doctrine does not apply under the facts of this case.

The trial court's order suppressing the evidence is affirmed.

APPENDIX "D"

(Filed March 17, 1988)

IN THE
DISTRICT COURT OF RENO COUNTY, KANSAS

87 CR 199

THE STATE OF KANSAS,
Plaintiff,

vs.

RONDALEE H. KING,
Defendant.

MEMORANDUM OPINION

At 1:47 A.M. on April 15, 1987, Officer Randy Hendricks of the Reno County Sheriff's Office noticed that a vehicle approaching him had only one headlight lit. He stopped the vehicle, a pickup truck being driven by Gene Beeney, and saw that neither taillight was operating and that the tag on the pickup had expired. While talking to Beeney, Hendricks looked in the pickup and saw a radar detector, two-way radio, a spotlight, an amber light with the connecting wires still attached and a blue vinyl carrying case. Hendricks took Beeney to his patrol car and wrote two traffic citations for the expired tag and no proof of liability insurance. Hendricks then asked Beeney if he could check the two-way radio and amber light for serial numbers to see if they had been reported as stolen, and Beeney consented. Hendricks went to the pickup, looked at the spotlight and radar detector. After that, he unzipped the blue vinyl case, and discovered

what appeared to be drugs and paraphernalia inside. Hendricks returned to his patrol car, tore up the two traffic citations and placed Beeney under arrest for the two charges for which he was originally issued citations. Beeney was transported to the Reno County Detention Center. While being booked, two bags of what appeared to be methamphetamine were found on his person. Beeney then stated that he had been given a pound of methamphetamine to sell in the Hutchinson area and was staying in a local motel room. This information was placed in an affidavit and a search warrant was obtained for the pickup and motel room. The defendant in this case, Rondalee King, was found in the motel room, and now stands charged with possession of methamphetamines with intent to sell and possession of marijuana. She asks that all the evidence be suppressed.

Officer Hendrick's search of the vinyl case cannot be sustained. Beeney was not under arrest at that time, he did not consent; he was not close to the pickup, and there was nothing about the exterior of the blue vinyl case that was incriminating in nature. State v. Galloway, 232 Kan. 87, 652 P. 2d 673 (1982). The problem for this defendant, however, is that she has no standing to object to the search of the pickup. She was neither the owner nor in possession of the vehicle. She apparently claims no interest in the property seized. State v. Boster, 217 Kan. 618, 539 P. 2d 294 (1975).

The search of the blue vinyl case, however, led to the arrest of the defendant, the discovery of the drugs on his person, and his statement to the police detective. The affidavit submitted to the magistrate for the issuance of the search warrant did not mention specifically the search of the vinyl case, but was drawn in such a way

as to indicate that all drugs and paraphernalia were found after the arrest. Clearly all the evidence extracted from Beeney and the later authorized searches of the pickup and motel room were the product of the improper search of the vinyl case and must be suppressed. Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Epperson, 237 Kan. 707, 703 P. 2d 761 (1985).

The defendant's motion to suppress any evidence obtained during and after the search of the blue vinyl case is granted.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One

CC: County Attorney
Richard Rome

NO. 88-2025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RONDALEE H. KING,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

John W. Campbell
Deputy Kansas Attorney General
Second Floor
Kansas Judicial Center
301 W. 10th Street
Topeka, Kansas 66612
(913) 296-2215

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities ii

Reasons Why The Writ Should Not Be Granted i

Conclusion 7

Affidavit of Filing 8

Certificate of Service 10

TABLE OF AUTHORITIES

Cases

Cox Broadcasting Corporation v. Cohn, 95 S. Ct. 1029, 420 U.S. 469, 43 L. Ed 2d 328 (1975) 2

Cox, Supra, 95 S. Ct. at 1040 3

Wong Sun v. United States, 371 U.S. 471, 9 L. Ed 2d 441, 83 S. Ct. 407 (1963) 6

Statutes

K.S.A. 22-3601(a) 1

K.S.A. 22-3603 1

K.S.A. 65-4127 1

K.S.A. 65-4127b(a)(3) 1

Supreme Court Rules

17.1(c) 4,7

7.04 Kansas Supreme Court 4

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner's Writ of Certiorari should be denied as a final judgement by the highest court in the state has not yet occurred. The Petitioner has yet to stand trial for the charges of felony possession of narcotic drugs with intent to sell, K.S.A. 65-4127b and possession of marijuana, K.S.A. 65-4127b(a)(3). Petitioner is presently awaiting trial in the District Court of Reno County, Kansas, on the named charges.

Petitioner seeks a Writ of Certiorari on decisions of the Kansas Court of Appeals and the Kansas Supreme Court as the result of an interlocutory appeal taken by the State of Kansas pursuant to K.S.A. 22-3601(a) and K.S.A. 22-3603. The Kansas Appellate Courts sustained the appeal of the State of Kansas which

allowed the criminal proceedings to move forward to trial.

Certain exceptions do exist where "finality" has been found on a federal issue where further state proceedings are pending. These exceptions are set out in Cox Broadcasting Corporation v. Cohn, 95 S. Ct. 1029, 420 U.S. 469, 43 L. Ed 2d 328 (1975). The applicable exception is as follows:

> "...where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive on any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal

> issue, which itself has been finally determined by the state courts for purposes of the state litigation."

Supra, 95 S. Ct. at 1040.

The state decisions on which review are sought determine the admissibility of evidence in a criminal proceeding. If Petitioner is acquitted on the criminal charges, review by the United States Supreme Court would be unnecessary. There is no allegation nor is there any basis for any allegation that an issue exists in this case that would seriously erode federal policy.

As indicated in Appendix B of Petitioner's Petition for Writ of Certiorari, the opinion of the Kansas Court of Appeals was not designated for publication. As the opinion was unpublished, the opinion is without value as precedent and cannot be cited as precedent by any court or in any brief or

other material presented to any court. Rule No. 7.04 of the Kansas Supreme Court. Therefore, the only effect of the decisions of the Kansas Appellate Court's in which review is being sought, is limited solely to one criminal case presently pending in the District Court of Reno County, Kansas.

Petitioner cites Supreme Court Rule 17.1(c) as a basis for jurisdiction:

> "when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Petitioner makes no claim that she seeks review of an important question of federal law which has not been, but should be, settled by this Court.

The question then becomes whether the state courts decided a federal question in

a way in conflict with applicable decisions of the United States Supreme Court. The decision made by the appellate courts of Kansas was that Petitioner did not have standing to object to the search of a pick-up truck and blue vinyl case in which she claimed no interest and was not present at the time of the search. Petitioner's Brief, Exhibit "B". Petitioner makes no claim that ruling was in error.

Petitioner apparently claims that the Kansas Court of Appeals and Kansas Supreme Court found that she did not have standing to object to the search of her motel room. Petitioner's Brief p. 7. No allegation or finding has ever been made that Petitioner did not have standing in relation to the motel room from which she was arrested. The issue decided was the evidence from the search of the pick-up

truck in which Petitioner did not have standing to object to did not taint the later search of the motel room.

Petitioner's basic argument is that it isn't fair that the co-defendant had the evidence suppressed because he had standing and that evidence wasn't suppressed against the Petitioner because she did not have standing. Contrary to Petitioner's position, that is the law according to the holding in Wong Sun v. United States, 371 U.S. 471, 9 L. Ed 2d 441, 83 S. Ct. 407 (1963).

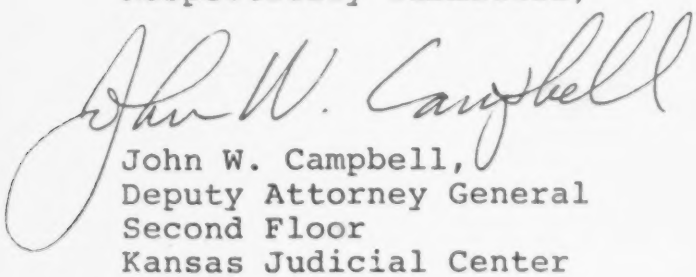
Petitioner also makes mention of false swearing in the affidavit for search warrant presented to the magistrate. Petitioner has not raised this issue at the trial level and now asks this Court to decide this newly raised issue on first impression. Petitioner should litigate

this issue at the state level under applicable state and federal law.

CONCLUSION

Petitioner's Writ of Certiorari should be denied as there has not seen final judgment at the State level. Also, the jurisdictional requirements of Rule 17.1(c) have not been met and Petitioner's Writ should be denied.

Respectfully submitted,



John W. Campbell,
Deputy Attorney General
Second Floor
Kansas Judicial Center
301 W. 10th Street
Topeka, Kansas 66612
(913) 296-2215

ATTORNEY FOR RESPONDENT

NO. 88-2025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RONDALEE H. KING,

Petitioner,

VS.

STATE OF KANSAS,

Respondent.

AFFIDAVIT OF TIMELY FILING

STATE OF KANSAS)
)
COUNTY OF SEDGWICK)

John W. Campbell, Attorney for the Respondent and a member of the Bar of the United States Supreme Court, pursuant to S. Ct. Rule 28.2, states that to his knowledge, 40 copies of the Brief in Opposition to the Petition for Writ of Certiorari in the above-styled case were

deposited in the United States mail, first class postage prepaid, addressed to:

Joseph Spaniol
Clerk of the Supreme Court
Supreme Court Building
Washington, D.C. 20543

on the 13th day of September, 1989, within the permitted time for filing.

John W. Campbell

John W. Campbell
Deputy Kansas Attorney General
Second Floor
Kansas Judicial Center
301 W. 10th Street
Topeka, Kansas 66612
(913) 296-2215

ATTORNEY FOR RESPONDENT

SWORN TO AND SUBSCRIBED before me on this 12th day of September, 1989.

Sue Baxter
NOTARY PUBLIC

My commission expires:
September 15, 1990

NO. 88-2025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RONDALEE H. KING,

Petitioner,

VS.

STATE OF KANSAS,

Respondent.

CERTIFICATE OF SERVICE

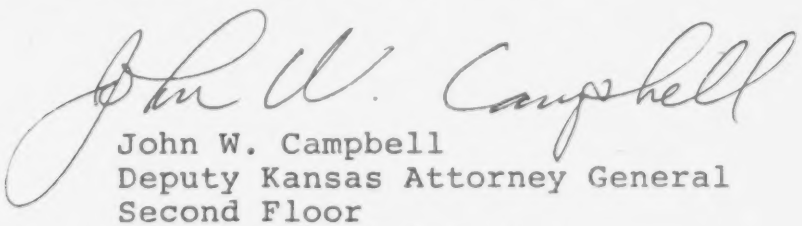
STATE OF KANSAS)
)
COUNTY OF SEDGWICK)

John W. Campbell, Attorney for the Respondent and a member of the Bar of the United States Supreme Court, states that to his knowledge, 3 copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-styled case were

deposited in the United States mail, first class postage prepaid, addressed to:

Richard Rome
Attorney for Petitioner
P.O. Box 964
Hutchinson, Kansas 67501-0964

on the 13th day of September, 1989.



John W. Campbell
Deputy Kansas Attorney General
Second Floor
Kansas Judicial Center
301 W. 10th Street
Topeka, Kansas 66612
(913) 296-2215

ATTORNEY FOR RESPONDENT